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No. 94-731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

COUNTY OF LAKE, INDIANA,

Petitioner,

v.

STEVEN MYERS and ROBERT MYERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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I.

Unable to defend the merits of the Seventh Circuit's errant Opinion, Respondents argue that the applicability of affirmative defenses to a governmental entity is a question of first impression in Indiana. (Respondents' Brief at 11). This is not true. That affirmative defenses involving a plaintiff's conduct bar liability as to governmental defendants is a well-settled doctrine in Indiana. No Indiana court

has ever questioned this fact. The only issue raised in the instant Petition is whether it was incumbent upon a federal Court of Appeals to apply existing State negligence law, or whether that court was free to conjure legal doctrines, without reference to any principle of Indiana law. Respondents fail utterly to respond to this issue.

Lake County's argument throughout has been that it was entitled to a directed verdict because it had established affirmative defenses involving Steven's conduct as a matter of law. No question concerning the appropriateness of these defenses was raised in the courts below. The Seventh Circuit ignored the issues argued by the parties, instead fashioning a hitherto unknown legal doctrine in the State of Indiana: that a governmental entity charged with negligence may not raise *any* affirmative defenses involving the plaintiff's conduct. Thus, the Seventh Circuit's Opinion, in defiance of existing Indiana law, occurred without the benefit of argument.

In Indiana, if a plaintiff's conduct contributes to his injury, plaintiff is barred from recovering from a negligent defendant, even though that defendant was *in loco parentis*. *Beckett v. Clinton Prairie School Corporation*, 504 N.E.2d 552 (Ind. 1987). Three years ago, the Seventh Circuit held that *Beckett* controlled in a prisoner rape case. *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991). (*See* Lake County's Petition at 8-9).

Neither the Seventh Circuit nor Respondents have shown why it is that *Beckett* properly controlled *McGill*, but has no application whatsoever in the case at bar. Indeed, *Beckett* is not even cited by Respondents in their filing in this Court. The reason for this failure is self-evident: there is no principled argument for distinguishing *McGill* and *Beckett* from this case. Unable to defend this egregiously aberrant Opinion, Respondents chant the mantra of "first impres-

sion" in an effort to minimize the unconscionable overreaching of the Seventh Circuit.

The import of the Seventh Circuit's decision cannot be overstated. The court held that if a defendant is charged with a duty to exercise reasonable care to prevent a suicide, it may not raise plaintiff's contribution to the suicide as an affirmative defense. The same rationale could be used to obviate these affirmative defenses in a simple slip-and-fall case: since the defendant's duty is to exercise reasonable care to prevent plaintiff from falling, defendant should not be able to raise plaintiff's contribution to the fall as a defense. The result is a complete re-writing of Indiana negligence law.

A dichotomy now exists thanks to the Seventh Circuit. Whenever a plaintiff can sue an Indiana governmental unit in federal court, *Myers* can be used to bar defendant from raising affirmative defenses. By contrast, if a plaintiff sues in State court, that court, bound by legislative enactments and precedents of Indiana reviewing courts, would allow governmental defendants to raise such affirmative defenses. This situation is abhorrent to principles of federalism, and the right of states to be the final arbiters of issues of state law. *Erie R. Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

The effect of the Seventh Circuit's Opinion is to make governmental entities including schools, hospitals, jails, and prisons, insurers of the safety of their charges. This proposition is contrary to an existing State statute and unanimous case-law of the State of Indiana. (*See* Lake County's Petition at 6-7). Indeed, the Indiana Court of Appeals has recently noted that it is contrary to public policy to hold custodial institutions as insurers of their charges' safety. *Cole v. Indiana Department of Corrections*, 616 N.E.2d 44, 45 (Ind.App. 1993).

Unable to address these arguments, Respondents spend approximately two-thirds of their Brief to show that there was sufficient evidence to support the jury's conclusion that Lake County was negligent. This argument wholly misses the point. The issue is not whether or not Lake County was negligent; it is whether Lake County has the right to raise the plaintiff's conduct as an affirmative defense notwithstanding its negligence. Lake County seeks relief in this Court upon the failure of a federal Court of Appeals to defer to existing State law involving traditional issues of State negligence law. At a time when the nation is engaged in a debate about the limits of federal power over the states, the Seventh Circuit has issued a published opinion eliminating affirmative defenses recognized by a State statute and invariably allowed under State decisional law. Certiorari is appropriate.

II.

In regards to the Seventh Circuit's error in failing properly to enforce limits of liability imposed by Ind. Code § 34-4-16.5-4 (Burns 1986), Respondents repeat the refrain that the father's and son's causes of action in this case are "separate and distinct." (Respondents' Brief at 15). *This is a proposition which Lake County has never disputed.* Instead, it has pointed out that, under Indiana law, a father's claim for loss of services and medical expenses is purely derivative of that of his son. *McNall v. Farmers Ins. Group*, 423 N.E.2d 593 (Ind. 1981); *Brown v. Slentz*, 237 Ind. 497, 147 N.E.2d 239, 240 (1958). Since the father's claim is derivative, it is subject to the same "per-person" limitation as the son's claim.

Respondents again assert that this issue is one of "first impression" as though there has been no Indiana law informative on the question of how many limits apply in

this case. In all other contexts in which Indiana law has been applied both by federal and State courts, the courts have consistently held that a derivative claim is subject to the same single cap as the underlying claim. (*See* Petition at 10-13). There is, therefore, no basis for a federal Court of Appeals to assert that an Indiana court would hold otherwise.

As it did in respect to liability, the Seventh Circuit merely substituted its own judgment, unsatisfied with enactments of the Indiana Legislature and decisions of Indiana courts. Not only does the Seventh Circuit believe itself unbound by Indiana law when deciding issues of State law; it also believes itself to be unbound by United States Supreme Court precedent mandating that existing State law must be applied. Certiorari is appropriate.

III.

Respondents have failed utterly to address Section II of the Petition for Certiorari. In this Section, Lake County set forth errors of law and fact committed by the Seventh Circuit, which tortured and distorted legal principles as well as the record on appeal. Respondents failed to controvert a single assertion of error.

It is self-evident that Respondents failed to controvert these errors because no defense is possible. The Seventh Circuit rewrote Indiana statutes, misstated the facts of cases, misinterpreted the holdings of cases, and committed at least nine egregious errors of fact.

The Seventh Circuit's aberrant behavior is utterly inconsistent with the norms and standards which litigants have a right to expect from a United States Court of Appeals. The Seventh Circuit may believe itself insulated from criticism for the egregious errors which it committed in its Opinion, because of the improbability of certiorari being

granted in any particular case. This indefensible conduct ought itself to be sufficient reason for this Court to exercise its discretion and grant certiorari.

Respectfully submitted,

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